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In the Supreme Court of the United States

COALITION OF NEW JERSEY SPORTSMEN, INC.; BOB'S LITTLE SPORTSHOP, INC.; SPRINGFIELD, INC.; ARMALITE, INC.; ROBERT L. VIDEN, JR.; STEPHEN D. MCCLURE; JOHN DOE I, II, III, IV, V, VI, VII, VIII, & IX,

Petitioners

v.

DONALD T. DIFRANCESCO, Acting Governor, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorney for Petitioner

**Counsel of Record* [Additional counsel listed on inside cover.]

12 pp

Additional counsel:

Gary J. Needleman
Needleman & Schocket
Montville Professional Bldg.
P.O. Box 187-Route 202
Montville, N.J. 07045
(201) 334-4422
Attorney for Petitioners

QUESTIONS PRESENTED

New Jersey Statutes § 2C:39-1 *et seq.* prohibits transfer and possession of any "assault firearm," which it defines by 66 model names by specified manufacturers and any firearm "which is substantially identical to any of the firearms listed above." Certain "assault firearms" designated by the Attorney General as "legitimate" could be registered by a deadline by members of registered gun clubs. The following issues arise under the due process, free speech, and equal protection guarantees of the First and Fourteenth Amendments:

1. Whether, in the context of felony penalties for possession of a firearm without an element of knowledge of the firearm's character, the definitions of "assault firearm" as 66 names and all "substantially identical" firearms fail to provide sufficient notice to firearm owners and adequate standards for police, rendering the provisions unconstitutionally vague. This involves whether a strict standard is required for pre-enforcement review of serious crimes not requiring scienter.

2. Whether prohibiting firearms engraved with specified names made by designated manufacturers, without regard to the physical characteristics of such firearms or the removal of any characteristics, violates free speech and equal protection.

3. Whether conditioning the registration of specified firearms on membership in a private club, and making it a felony for all other persons who possessed identical firearms before the date of enactment to continue such possession, violates the rights to freedom of association and to equal protection.

PARTIES TO PROCEEDING

In addition to the respondent identified in the caption, respondents include JOHN J. FARMER, JR., Attorney General; COLONEL CARSON J. DUNBAR, Superintendent, Division of State Police; ANDREW N. YURIK, Prosecutor of Gloucester County; and PATRICIA KUNCHYNSKI, Chief of Glassboro Police Department.

The corporations which are petitioners here include COALITION OF NEW JERSEY SPORTSMEN, INC.; BOB'S LITTLE SPORTSHOP, INC.; SPRINGFIELD, INC.; and ARMALITE, INC. None of these corporations have any parent companies, and no publicly held company owns 10% or more of the stock of any of these corporations.

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OPINIONS BELOW

The opinion of the court of appeals is unpublished and is printed in the Appendix ("App.") at 1a. The unreported order denying the petition for rehearing and petition for rehearing *en banc* is at App. 11a. The opinion of the district court, App. 12a, is published at 44 F. Supp.2d 666.

JURISDICTION

On March 21, 2001, the court of appeals rendered judgment affirming the district court's order granting summary judgment to defendants-appellees. App. 8a. On April 26, 2001, the court of appeals denied the petitions for rehearing and for rehearing *en banc*. App. 11a. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES AND REGULATIONS

The texts of the following are in the Appendix: United States Constitution, Amendments I and XIV; New Jersey Statutes, §§ 2C:39-1 (selected definitions), 2C:39-3j, 2C:39-5f, 2C:39-9g, 2C:39-9h, 2C:43-6a, and 2C:58-12.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The complaint, which was filed in 1996, sought a declaratory judgment that New Jersey's criminal prohibitions on "assault firearms," N.J.S. §§ 2C:39-1 *et seq.*, violated U.S. Const. Amend. XIV, and also sought an injunction against the

enforcement thereof. Plaintiffs include a firearms association, two firearms manufacturers, a licensed dealer, and individual firearm owners. Defendants include the Governor and law enforcement authorities of New Jersey.[1]

The district court had jurisdiction under 28 U.S.C. § 1331. On June 20, 1997, the district court denied the motions of defendants for summary judgment, to dismiss under Rule 12 (b)(6), and to stay on abstention grounds. On March 31, 1999, the court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment.[2] App.65a.

The court of appeals affirmed. While recognizing a split in the circuits concerning the standards for deciding whether a law is vague, it decided that a criminal statute with felony penalties and no scienter requirement was not subject to a strict standard, unless a constitutional right is implicated. App. 4-5a. The court expressed "some concerns with" with the term "substantially identical," but held that it has a core. App. 5a.

The court also held that banning firearms based on the names engraved thereon was consistent with First Amendment standards for regulation of commercial speech. The court did not address the issue of whether requiring membership in a gun club to register a firearm violated freedom of association.

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[1] Pursuant to Rule 35.3, the following successors in office are reflected herein: Acting Governor Donald T. DiFrancesco for former Governor Christine Todd Whitman; Attorney General John J. Farmer for Peter Verniero (originally Deborah T. Poritz); Col. Carson J. Dunbar, Superintendent, Division of State Police, for Carl A. Williams; Andrew N. Yurik, II, Gloucester County Prosecutor, for Harris Y. Cotton.

[2] The court found that this action is not barred by the Eleventh Amendment and abstention doctrines and that standing and ripeness requirements are met. App. 19-24a. On the merits, the court upheld parts of the Act and abstained from deciding other portions.

The court of appeals thereafter denied the petition for rehearing and petition for rehearing *en banc*.

Statement of Facts

P.L. 1990, Ch. 32, amended New Jersey Statutes ("N.J.S.") § 2C:39-1 *et seq.* ("the Act"). Section 2C:39-1w defines "assault firearm" to include specific models by named companies, "substantially identical" firearms, and certain generically-defined firearms. Section 2C:39-5f prohibits knowing possession of an assault firearm, and § 2C:39-9g prohibits transportation or sale thereof. Section 2C:43-6a(3) punishes violation by imprisonment for three to five years.[3]

Section 2C:58-12b allowed a person to register and keep an assault firearm determined by the Attorney General to be "legitimate" for target shooting, if it was purchased by May 1, 1990, and if the owner was a member of a rifle or pistol club.

Petitioners (plaintiffs-appellants below) include corporations and individuals. Coalition of New Jersey Sportsmen, Inc., consists of 57 clubs and associations representing hundreds of thousands of target shooters, hunters, and gun collectors. Bob's Little Sportshop, Inc., is a federally and State licensed dealer in firearms in Glassboro, N.J. Springfield, Inc., and ArmaLite, Inc., are federally licensed manufacturers of target rifles and other firearms and are both located at Geneseo, Illinois. Petitioners include named individuals and John Does. Respondents include New Jersey's governor, attorney general, and superintendent of state police,

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[3] Section 2C:39-3j prohibits knowing possession of a large capacity ammunition magazine, and § 2C:39-9h prohibits its transport or sale. Section 2C:43-6a(4) punishes violation by 18-months imprisonment.

together with the Gloucester County Prosecutor and the Glassboro Police Chief.

Plaintiffs who were not club members could not register assault firearms. ArmaLite, Springfield, and Bob's Little Sportshop have lost profits because they cannot market numerous firearms in New Jersey. "Defendants will cause the prosecution of persons, including plaintiffs or Coalition members, for any known or perceived violations of the Act." Compl., Jt. Answer ¶ 30. "Violation of the Act would subject plaintiffs to arrest, prosecution, incarceration, fines, confiscation of property, loss of livelihood and revocation of applicable licenses." *Id.* ¶ 32. The record is replete with contradictory answers from the State Police about the meaning of "assault firearm" as well as arrests and prosecutions.[4]

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE A CIRCUIT CONFLICT ON VAGUENESS STANDARDS FOR SERIOUS CRIMES WITHOUT SCIENTER, AND TO DECIDE WHETHER PRODUCT-NAME BANS AND REQUIRED CLUB MEMBERSHIPS ARE CONSISTENT WITH THE FIRST AMENDMENT

The court of appeals has entered a decision in conflict with the decisions of another United States court of appeals on

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[4] The district court noted that police advised a plaintiff that the AR7 rifle is not an assault firearm, and later arrested him and charged that it is an assault firearm. "Other examples are also provided, which tend to show an inconsistent application of the law based on the confusing 'substantially identical' standard used to define what is prohibited." App. 35a.

the same important matter, and in a manner which conflicts with relevant decisions of this Court. Specifically, the court of appeals rejected the view that terms in a criminal statute with no scienter requirement must be strictly reviewed for vagueness. "We decline to follow the Sixth Circuit Court of Appeals in adopting this approach." App. 5a; *see* App. 39a (opinion of district court). *See Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (both declaring "assault weapon" prohibitions vague).

The Third Circuit's disposition is consistent with that of the Second Circuit. *See Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684-85 (2nd Cir. 1996) (upholding "assault weapon" ordinance). However, the rule followed by the Sixth Circuit is in accord with that of the Ninth Circuit. *See Forbes v. Napolitano*, 236 F.3d 1009, 1011-12 (9th Cir. 2000).

The circuit conflict poses contradictory interpretations of this Court's precedents concerning vagueness, such as *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 492 (1982) and *Chicago v. Morales*, 527 U.S. 41 (1999). The opinion of the court of appeals here misconstrues the rules set forth by this Court in those and related precedents.

Further, the court of appeals decided important questions of federal law that have not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court on the First Amendment. Specifically, the court upheld a prohibition on use of a particular name on a product (here, a firearm), without regard to the product's physical features. This is inconsistent with this Court's precedents on free speech and is irrational.

Moreover, the court further upheld a requirement that, to register an otherwise banned "assault firearm" by a certain

deadline, one must have been a member of a registered gun club. This is not in accord with this Court's precedents on freedom of association (and the concomitant right not to associate) and is irrational.

I. THE ACT IS UNCONSTITUTIONALLY VAGUE

New Jersey Statutes § 2C:39-1w defines "assault firearm" to include 66 different named models and any firearm "which is substantially identical to any of the firearms listed above." Possession or sale of an assault firearm is punishable by imprisonment for three to five years. §§ 2C:39-5f, -9g, 2C:43-6a(3). No scienter is required, in that "knowledge of the character of the weapon is not an element of the offense." *State v. Pelleteri*, 294 N.J. Super. 330, 683 A.2d 555, 557 (1996), *certif. den.* 148 N.J. 461(1997).[5] Petitioners ("the Coalition") challenged several of the names[6] and particularly the term

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[5] By contrast, federal law requires proof of knowledge of "the characteristics that brought it [the weapon] within the statutory definition." *Staples v. United States*, 511 U.S. 600, 602 (1994). "There is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610.

[6] Many of the listings do not exist, are machinegun names, or are otherwise misnamed. Circuit Appendix ("Cir. App.") 143-44a. For instance, the list includes "Avtomat Kalashnikov type semi-automatic firearms." "Avtomat" is Russian for "any automatic device" or "submachine gun" (i.e., a fully automatic firearm). K. Katzner, *English-Russian/Russian-English Dictionary* 418 (N.Y. 1984). Since a semi-automatic is not automatic, the draftsman's use of Russian resulted in an oxymoron. Further, "Avtomat Kalashnikov" is not engraved on any firearm ever produced. Cir. App. 144a-145a. Yet under this designation, sportsmen have been prosecuted for rifles marked "MAK90."

Another listing is "Uzi type semi-automatic firearms. "Uzi" is a

"substantially identical" as vague.

The court of appeals held that the Act does not implicate any constitutionally protected conduct and thus may be stricken only if vague in all of its applications.[7] App. 4-5a. It rejected the rule that "a criminal statute without a scienter requirement" is subject to close scrutiny for vagueness. *Id.* at 5a. It does not matter "whether the statute challenged is civil or criminal," but only whether constitutional rights are implicated. *Id.*

This Court's latest word on the subject is *Chicago v. Morales*, 527 U.S. 41 (1999), which declared as facially vague a prohibition on loitering with "no apparent purpose" after police have ordered dispersal and one of the persons is a "criminal street gang member." The following holding is dispositive here: "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may

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man, not a gun -- the Israeli firearm designer Uziel Gal. The State Police claim that this includes the Uzi "Model A and Model B" pistols but not the "Uzi Eagle" pistol. Cir. App. 177a. Numerous other discrepancies are documented in the record.

[7] The meaning of the Second Amendment and whether it is incorporated against the States through the Fourteenth Amendment have not been raised in this litigation. "[T]he Second Amendment protects 'the right of the people to keep and bear Arms,'. . . . 'The people' protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community . . . ." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990). *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) notes that "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right. *See, e.g.*, J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 162 (1994); S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984) . . . ." *See also* Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* (1998).

be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 52.

Morales is a plurality opinion joined in by three Justices, but six Justices concurred with Part V of the opinion.[8] Part V does not suggest that any constitutionally protected interest was implicated, and instead holds that the law violated "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 60. "Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it 'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.'" *Id.*

Although the Justices who dissented differed with the majority on the answer to that question, they did not dispute the principle. Further, the Act here reaches innocent conduct – mere possession of a firearm.

The term "substantially identical" as used in the Act here is parallel with the vague terminology in *Morales*: "The 'no apparent purpose' standard for making that decision [to order dispersal] is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene.'" *Id.* at 61-62. Since "we must assume that the ordinance means what it says," this Court "refused to accept the general order issued by the police department as a sufficient limitation on the 'vast amount of discretion' granted to the

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[8] Souter and Ginsburg, JJ., joined in the plurality opinion by Stevens, J. *See id.* at 66-67 (O'Connor, J., concurring, joined by Breyer, J.) ("I agree with Part V of the Court's opinion"); *id.* at 69 (Kennedy, J., concurring) ("I join Parts I, II, and V").

police in its enforcement."[9] *Id.* at 63. Loitering is "innocent and harmless," *id.* at 64, but that does not imply that it is constitutionally protected. Thus, six Justices agreed with the rule in Part V that a criminal law lacking sufficient standards is facially vague, regardless of whether it implicates a constitutional right.

The plurality opinion states that the law "does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional," but suggests that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 52-53. But that need not be resolved:

> There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. . . . For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement."[10]

Id. at 55.

Morales rejected the view that "to mount a successful

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[9] The Attorney General here adopted Guidelines – which "are not binding on county prosecutors" (App. 6a) – inventing the idea that "substantially identical" includes generic definitions which are no where implied in the Act. However, "the statutory definition of the term excludes unstated meanings of that term." *Stenberg v. Carhart*, 120 S. Ct. 2597, 2614 (2000).

[10] "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* at 56.

facial challenge, a plaintiff must 'establish that no set of circumstances exists under which the Act would be valid.'" *Id.* at 55 n.22, citing *United States v. Salerno*, 481 U.S. 739, 745 (1987). "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . ."[11] *Id.* at 55 n.22. "Since we . . . conclude that vagueness permeates the ordinance, a facial challenge is appropriate." *Id.*

Justice O'Connor concurred that the "ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers." *Id.* at 65-66 (O'Connor, J., concurring). Similarly, Justice Breyer denied that the ruling violated the "rules governing facial challenges," concluding that "the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances." *Id.* at 71 (Breyer, J., concurring). "[I]f every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *Id.* Finding examples where a vague law might apply will not save the law:

> But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than could it apply an (imaginary) statute that said, "It is a crime to do wrong," even to the worst of murderers. *See Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it").

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[11] *Salerno* concerned the constitutionality of the Bail Reform Act and presented no issue of vagueness.

Id.

Lanzetta, which this Court has cited as authority in virtually every vagueness decision, invalidated a law as facially vague without any constitutional right at stake other than the due process right not to be subject to criminal penalties for conduct which is not clearly proscribed. It invalidated a prohibition on "gang" membership as vague under the principle: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta*, 306 U.S. at 452-53.

The decision of the court of appeals here is at odds with this Court's jurisprudence from *Lanzetta* through *Morales*. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). Economic regulations which establish crimes have been declared facially vague.[12] *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972), held a vagrancy prohibition facially vague even though the activities at issue "are not mentioned in the Constitution or in the Bill of Rights."

Colautti v. Franklin, 439 U.S. 379 (1979), invalidated a law requiring a physician performing an abortion to utilize certain techniques when there is "sufficient reason to believe that the fetus may be viable." *Colautti* explained:

> This Court has long recognized that the

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[12] *United States v. Cardiff*, 344 U.S. 174, 174-75 (1952) (refusal of factory owner to permit entry "at reasonable times" held vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) ("wilfully" charging "any unjust or unreasonable rate" for "necessaries" held vague); *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223-24 (1914) (Holmes, J.) (compelling persons "to guess on peril of indictment" uncertain facts "is to exact gifts that mankind does not possess").

> constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. . . . Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." *United States v. Ragen*, 314 U.S. 513, 524 (1942).[13]

Id. at 395. *Ragen* was a tax-evasion case not involving constitutionally-protected conduct, and thus the above states the rule for all criminal statutes.[14]

The ordinance in *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 492 (1982), required a business to obtain a license to sell drug paraphernalia, violation of which was punishable by fine only. An official advised the business of which products were included. *Id.* at 493. This Court held: "The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment." *Id.* at 498. It continued:

> Thus, economic regulation is subject to a less strict vagueness test . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of

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[13] *Ragen, id.*, noted: "A mind intent upon willful evasion is inconsistent with surprised innocence. . . . [T]he charge . . . amply instructed the jury that scienter is an essential element of the offense."

[14] *See Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 2498 (2000) (vagueness "ameliorated" by scienter requirement). The court of appeals cited *United States v. Mishra*, 979 F.2d 301, 309 (3rd Cir. 1992), a drug paraphernalia case, but the court there stated that "our finding of scienter helps to cure a law's vagueness."

> imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Id. at 498-99. The court of appeals here (App. 4-5a) ignores that the Act is no mere economic regulation with civil penalties, but is a serious felony with no scienter element.[15]

Hoffman Estates added: "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 499. This does not deny that the other factors listed above are still important, though "perhaps" not "the most" important.

Hoffman Estates found that the ordinance simply regulated business, required scienter, and imposed only civil penalties. *Id.* at 499. It upheld the terms "designed or marketed for use" as not vague, but suggested that the ordinance would have been facially vague had it been less clear — "a regulation of 'paraphernalia' alone would not provide much warning of the nature of the items regulated." *Id.* at 500 n.17.

Kolender v. Lawson, 461 U.S. 352, 353-54 (1983), held as vague on its face a requirement that persons who loiter provide a "credible and reliable" identification, which the police would determine and which thus lacked any standard. "[T]his is not a case where further precision in the statutory language is either impossible or impractical." *Id.* at 361.

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[15] *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684-86 (2nd Cir. 1996), which upheld from facial challenge an "assault weapon" ban, also cites *Hoffman Estates* but fails to discuss the stricter test for criminal laws with no scienter requirement.

Kolender rejected the argument that a statute "should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Id.* at 358 n.8. It explained:

> The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." . . . Second, where a statute imposes criminal penalties, the standard of certainty is higher. . . . This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. *See, e.g.*, . . . *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

Kolender, 461 U.S. at 358-59 n.8. Again, *Lanzetta* did not involve constitutionally-protected conduct, yet it invalidated the statute on its face even though it may have had some valid application.[16] Thus, the above rule applies to all criminal provisions.

Kolender also rejected the view that a facial challenge is restricted to First Amendment cases, also recognizing "facial challenges in the arbitrary enforcement context." *Id.* Reliance on *Hoffman Estates* was misplaced, given that "economic regulation is subject to a less strict vagueness test . . . ."[17] *Id.*

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[16] For instance, in *Lanzetta* the defendant might have confessed to being a "gang" member, just as in *Kolender* a person may have exhibited a passport and a driver's license as "credible and reliable" identification.

[17] The dissent argued that the test should be whether the law has a "core" and is not vague in all its applications, giving an example in which the ordinance would not be vague. *Id.* at 370-73 (White, J., dissenting). "The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* . . . ." *Id.* at 372 n.*. If true, *Kolender* is the more recent, binding precedent.

This Court's precedents were correctly followed by the Sixth Circuit in *Springfield Armory v. City of Columbus*, 29 F.3d at 251, which declared as "unconstitutionally vague on its face" a law (almost identical to that of New Jersey here) defining "assault weapon" as listed models as well as "slight modifications." "The ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge." *Id.* at 252. "The average gun owner knows very little about how his gun operates or its design features." *Id.* at 253.

"A criminal statute may be facially invalid even if it has some conceivable application." *Id.* at 252 (citing *Kolender* and *Colautti*). The precedents do *not* suggest "that a facial challenge cannot succeed simply because constitutionally-protected activity is not imperiled. To the contrary, the Supreme Court has expressly stated that the question of whether or not a statute impinges on constitutionally-protected activity is but the first inquiry in a court's examination of a statute challenged on vagueness grounds." *Id.* at 254, citing *Hoffman Estates*, 455 U.S. at 494.

The Sixth Circuit again applied this Court's precedents properly in *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d at 533, which also held "assault weapon" definitions to be facially vague under the principle, "When criminal penalties are at stake . . . a relatively strict test is warranted." "We also must consider whether the statute contains a scienter requirement or imposes strict liability. . . . Indeed, '[i]n the absence of a scienter requirement . . . [a] statute is little more than a trap for those who act in good faith.'" *Id.* at 534, quoting *Colautti*, 439 U.S. at 395.

The Ninth Circuit agrees that the strict test for vagueness applies regardless of whether constitutionally-

protected conduct is implicated. *Forbes v. Napolitano*, 236 F.3d 1009, 1011-12 (9th Cir. 2000) (invalidating on its face a prohibition on medical procedures on certain fetal tissue due to the vagueness of the terms "experimentation," "investigation," and "routine"). The court stated the rule as follows:

> If a statute subjects transgressors to criminal penalties, as this one does, vagueness review is even more exacting. . . . In addition to defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement. . . . Without such standards, a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. . . . Regardless of what type of conduct the criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the Constitution's due process guarantee.

Id. (citations omitted).

The court of appeals here had "some concerns with" the definition of assault firearm as those that are "substantially identical" to firearms listed by name, but found the term to have a "core." App. 4-5a. Supposedly "photographs of prohibited weapons are available for comparison," allowing one to know what is "substantially identical."[18] App. 5a. By "comparison

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[18] By contrast, "we judge the statute on its face." *United States v. Harriss*, 347 U.S. 612, 617 (1954). *Sabetti v. Dipaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (opinion by Breyer, C.J.) explains:

> [A] criminal statute fails to provide fair notice if a "person of ordinary intelligence," . . . "examining [only] the language of the statute," . . . would be in some way surprised that it prohibited the conduct in question. "It is not enough," we have explained, for the

with photographs," one can learn whether weapons are "the same in some essential way other than color – such as, for example, barrel or handle length, magazine capacity, or type of ammunition used . . . ."[19] App. 6a.

Yet one would have to study hundreds of features on hundreds of photographs, for the law lists 66 different models, and 23 are designated as "type(s)" or "series," indicating limitless variations. It is unclear where one would find such a collection or how one would know which features to look for. Further, photographs depict superficial, cosmetic features, but whether significant design features, such as the internal operating parts, of two firearms are "substantially identical"

> true meaning of the statute "to be apparent elsewhere," in extra-textual materials . . . . (Citations omitted.)

Robertson v. Denver, 874 P.2d 325, 334 (Colo. 1994), invalidated an "assault weapon" definition because "these characteristics cannot be readily [ascertained] by a person of common intelligence." It rejected the argument that one could study publications to learn whether a gun is derived from an assault weapon, *id.* at 334-35:

> Whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law. . . . The assault weapon ordinance does not specify any source which would aid in defining what an assault pistol is, nor does it state where such a source can be found.

[19] Holding the similar term "substantial portion" of a fetus to be vague, *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 137 (3rd Cir. 2000), asked harder questions:

> Questions immediately arise as to whether "substantial portion" is measured in terms of size or volume in relation to the remainder of the body, length of the body, functionality, or a combination of these factors. Even if "substantial portion" were only interpreted to mean size, reasonable minds may well differ as to how much of a fetus is substantial: two limbs, four limbs, at least half of its body, all but the head?

would be known only by the firearm designer.[20]

"Substantially identical" was declared vague in *State v. Merrill*, N.J. Sup. Ct., Monmouth Co. (1996), Cir. App. 288a, as follows:

> How is this Defendant or any defendant to know if his firearm is "substantially identical" unless he is intimately familiar with the nomenclature of the other 37 weapons? This is an impossibility and a task which the law cannot require. If the State wishes to ban a firearm, it's a simple task to list it or list the characteristics, which if possessed, would put the weapon in the prohibited category.

"Substantially identical" is equivalent to "slight modifications," which was held vague in *Springfield Armory*, 29 F.3d at 252. "How is the ordinary consumer to determine which changes may be considered slight? A weapon's accuracy, magazine capacity, velocity, size and shape and the caliber of ammunition it takes can all be altered." *Id.* at 253. *Springfield* further explains (*id.*):

> Even if the term "slight" did not render this provision void, the ordinance's "modification" requirement would. In order for differences to constitute a "modification" the weapon in question must have been developed from one of the listed firearms. . . . Ordinary consumers cannot be expected to know the developmental history of a particular weapon . . . .

The Coalition argued for objective standards, such as the common definition of a regulated shotgun as one with a barrel less than 18 inches in length. The court of appeals

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[20] "Gas operation" was one of the "similar features" cited to uphold an assault firearm conviction in *State v. Tanis*, N.J. Sup. Ct., App. Div. (1998). *See* Cir. App. 316a.

rejected this because manufacturers could "skirt" it by making a barrel 1/8 inch longer. App. 6a. This is like saying that going 54 mph "skirts" the 55 mph speed limit, and that the law should prohibit "going too fast," which is no standard at all.[21]

In sum, the decision conflicts with this Court's precedents on vagueness standards from *Lanzetta* to *Morales*, and is inconsistent with Sixth Circuit precedents on application of these standards to criminal prohibitions on firearms.

II. THE NAME BAN VIOLATES FREE SPEECH

The Act defines "assault firearm" in part as a firearm with a specific name made by a specific corporate person, without regard to any physical characteristic of the firearm. Censoring designated manufacturers from using certain names for products without regard to the characteristics thereof violates the rights to free speech and press and to equal protection guaranteed by the First and Fourteenth Amendments.

N.J.S. § 2C:39-1w(1) "define[s] and prohibit[s] firearms based on the words used by manufacturers to name such firearms." Compl., Jt. Answer ¶ 87. "If a particular gun is a named assault firearm pursuant to N.J.S.A. 2C:39-1w(1), it is a prohibited weapon no matter its features." Br. in Support of Defendants' Mot. for Sum. Judg. 47.

Naming petitioners-manufacturers here, § 2C:39-1w(1) includes the "Armalite AR-180 type" and the "Springfield Armory BM59 and SAR-48 type." "The Act prohibits ArmaLite from marketing in New Jersey any rifle with the words 'AR-180,' . . . inscribed on them even though such rifles would not be 'assault firearms' without the use of these words."

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[21] *See Connally v. General Constr. Co.*, 269 U.S. 385, 395 (1926) ("locality" vague, as it "provokes the inquiry, 'How near?'").

Compl., Answer ¶ 84. The parties further agree:

> The Act prohibits Springfield from selling in New Jersey any firearm, no matter what its features, with the words "Springfield Armory BM59 and SAR-48" inscribed on them. . . . . The firearm so marked could be a .22 caliber single shot, but it would still be illegal.

Pls.' State. of Material Facts, Defs.' Counter State. of Material Facts ¶ 9.

A firearm that is not named in the Act, if it is otherwise defined as an "assault firearm," may be modified and escape such classification. However, this does not "apply to firearms that are specifically listed in *N.J.S.A.* 2C:39-1w(2) as prohibited firearms." Cir. App. 173a (Dept. of Law and Public Safety, March 31, 1997).

The Attorney General asserts that a firearm is not "substantially identical" to a listed assault firearm if it does not meet certain generic criteria.[22] Cir. App. 171a-172a (Guidelines, August 19, 1996). A firearm may be removed from the assault firearm category by altering it to meet this criteria *unless* its very name is prohibited. In short, the Act bans words on firearms, not firearm designs.

"Proclaim Liberty throughout all the Land unto all the Inhabitants thereof." The First Amendment protects words engraved on metal – in this case, on the Liberty Bell – as much as words printed on paper. "The liberty of the press is not confined to newspapers . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

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[22] These generic criteria are not found in the Act or remotely implied by any of its definitions, and instead are a word-for-word rendition of federal assault weapon definitions, 18 U.S.C. § 921(a)(30)(B), (C), & (D).

The speech prohibitions here apply only to the manufacturers named in the statute. In *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1885-86 (2000), the law "single[d] out particular programmers" in that it applied only to channels "dedicated to sexually-oriented programming." "One sponsor of the measure even identified appellee by name. . . . Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Id.*

It is no excuse that the named makers can use other model names. "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *Id.* at 1886. As here, *Playboy* involved "a content-based speech restriction," which invokes the strict scrutiny test. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*

A less restrictive alternative is obviously available here: the legislature could define what features, other than the names, it finds objectionable. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id.* at 1888. Moreover, "'content-based regulations are presumptively invalid,'. . . and the Government bears the burden to rebut that presumption." *Id.*, citing *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992).

The district court here conceded that "the indirect effect of these listings are that manufacturers who wish to engage in business in New Jersey are restricted (in a very minor way) how they can name such a weapon." App. 60a. However, *Playboy* noted: "We cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is

one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." 120 S. Ct. at 1893. The legislature obviously found the listed manufacturers and the names they used to be offensive, perhaps as symbolic of some ugly "gun culture."

The court of appeals decided that the name prohibition "should be reviewed as a commercial speech regulation, subject to lesser scrutiny." App. 7a. However, a name engraved on a firearm, like the name printed on a book which is for sale, is not commercial speech. An advertisement for a firearm or a book, such as on television or in a magazine, is commercial speech.

Applying the commercial speech tests of *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), the district court (whose reasoning the court of appeals endorsed) decided that, first, the state asserted "a substantial government interest" to justify the "suppression of commercial speech" here "in light of the evidence of record demonstrating the firepower of such weapons and their relation to crime . . . " App. 61a. Yet the legislature did not define generically the features of this "firepower" or the nature of these "weapons." Instead, it banned firearms engraved with specific names, and the ban endures even if the "firepower" is eliminated.

Central Hudson requires, second, that "the regulatory technique be in proportion to that interest," and third, that the incursion must be "designed carefully to achieve the State's goal." The court found that these are met, App. 60a, again ignoring that a ban on a name is not equivalent to a ban on a specific product design.

"A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). No such demonstration has been made here.

The Act violates equal protection because it prohibits

products based on what is written on them and confines its prohibition to named manufacturers. The name ban eschews generic definitions which would have treated similarly-situated manufacturers and consumers alike. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (invalidating law banning disclosure of alcohol content on beer labels but allowing it on wine and spirit labels).

Equally irrational is that the prohibition is limited to products made and named by Springfield, ArmaLite, and other disfavored companies, but "left unregulated are all other firearms by non-listed manufacturers which fire exactly the same cartridges . . . ." Compl., Jt. Answer ¶ 98. By analogy, the legislature could not ban use of a given model name on a Chevrolet, but allow an equally-powerful Ford with any name.

Springfield Armory, 29 F.3d 250, invalidated a ban on a list of "assault weapons" (using the same names as New Jersey) and "slight modifications or enhancements" thereof, which it held to be vague. The court explained:

> [T]he ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge. The Columbus ordinance outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability. . . . The ordinance purports to ban "assault weapons" but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selections.

Id. at 252.

"Nor is there an explanation for drafting the ordinance in terms of brand name rather than generic type or category of weapon." *Id.* at 253. Since "slight modifications" was void for vagueness, the list of named firearms was irrational:

Here, the catch-all phrase is the only element that brings

> any generality to the measure. The provision seems integral to the ordinance since without it manufacturers could circumvent the ban by merely changing the names of the listed weapons. In view of the arbitrary nature of the ordinance . . . we hold the assault weapon provisions of the ordinance . . . invalid.[23]

Id. at 254.

In sum, the Act's ban on the use by specified manufacturers of specified names violates the rights to free speech and press and to equal protection of the laws.

III. THE CLUB-MEMBERSHIP REQUIREMENT VIOLATES FREEDOM OF ASSOCIATION

The First and Fourteenth Amendments to the U.S. Constitution protect the right to freedom of association and prohibit a State from denying the equal protection of the laws. The Act violates these rights by having required, as a condition of registration of assault firearms and large capacity magazines, membership in certain clubs.

Section 2C:58-12b(4) provides that an assault firearm declared "legitimate" by the Attorney General and purchased by May 1, 1990, may be registered within one year of the effective date if: the owner is "a member of a rifle or pistol club in existence prior to the effective date," the owner "joined the club no later than 210 days after the effective date," and the club files its charter with the Superintendent of State Police within 180 days of the effective date. Section 2C:39-3j makes possession of a large capacity ammunition magazine lawful only for a registrant. The registrant need not remain a club member.

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[23] *See Citizens for a Safer Community v. Rochester*, 627 N.Y.S.2d 193, 197, 204 (Sup. 1994) (invalidating "attempts to make criminal the sale or the possession of certain guns of some manufacturers while allowing the possession of essentially identical guns made by others").

The club membership requirement discriminates against petitioners who were not members within the prescribed time, but who owned "legitimate" assault firearms and large capacity magazines purchased before May 1, 1990.[24] It preconditions a liberty and property right not on prior lawful property ownership, but on membership in a private club and sacrifice of privacy interests in the fact of one's membership. By requiring membership only in the registration period, it discriminates against persons who were not members then, but who later joined a club, and in favor of persons who were members during the registration period, but who thereafter let their membership lapse.

Many gun clubs which registered with the Attorney General are affiliates of the National Rifle Association ("NRA"), which is highly political, and promotes hunting. Of 1156 members reported on club rosters, only 51, or 4.6 %, were women. A noncitizen may not join some clubs. Cir. App. 237a-238. For one who opposes the NRA or hunting, club membership required endorsement of adverse beliefs. A woman may not feel at ease in a male-dominated club. Despite this evidence, the district court concluded that the association here is not political or infused with beliefs which are offensive to some, that no fundamental right is involved, and the rational relation test applies. Cir. App. 49a, 52a-53a. The court of appeals did not address the issue.

Section 2C:58-12a required the Attorney General to promulgate a list of assault firearms "used for legitimate target-shooting purposes," adding that "this list shall include . . . any . . . assault firearm used in competitive shooting matches

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[24] Persons were not club members for various reasons, including disagreement with club beliefs on political issues, high fees, inability to be endorsed by members, desire not be associated with club members, lack of open memberships, and lack of a club within a convenient distance. Cir. App. 228a-229a,162a-163a.

sanctioned by the Director of Civilian Marksmanship ["DCM"] of the United States Department of the Army." DCM-sanctioned matches, like shooting matches in general, require no club membership. Membership in a club is not a condition for eligibility for participation in the Civilian Marksmanship Program. *See* § 1613, Tit. XVI, 104 P.L. 106, 110 Stat. 186 (1996). "All US citizens 16 years of age or older," without any requirement of club membership, may enter DCM matches. 32 C.F.R. § 544.30(a), (b). Moreover, all rifle ranges built with federal funds are open to all persons without any club-membership requirement. 10 U.S.C. § 4309(a).

No nexus exists between club membership and competitions. A competitor need not be in a club, and a club need not sponsor competitions or even have a range.

The First Amendment encompasses the right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States*, 468 U.S. 609, 622-23 (1984). "Freedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000). "To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.' The First Amendment's protection of expressive association is not reserved for advocacy groups." *Id.* Through their association with the NRA, gun clubs engage in advocacy. Further, gun clubs are much like the Boy Scouts in the following respects:

> The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. . . . It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts, supra*, at 636 (O'Connor, J., concurring) ("Even the

> training of outdoor survival skills . . . might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").[25]

Id. at 2452.

The Act violates freedom of association not only by compelling membership in a gun club, but also by requiring a registrant to report such membership. "State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (invalidating compelled disclosure of memberships).

Gavett v. Alexander, 477 F.Supp. 1035, 1044-45 (D. D.C. 1979), found a law requiring NRA membership for purchase of a military rifle from the government to be violative of free association and equal protection. While the law's purpose was to promote marksmanship, "it is obviously possible to become a competent marksman on an individual basis" and "outside an organizational framework." *Id.* at 1048. The NRA membership requirement did not even pass the rational basis test. *Id.* at 1044-45, 1049. The question in *Gavett* was the same as here: "is the requirement of NRA membership 'the means least restrictive' of First Amendment freedoms to achieve the government's legitimate end? The answer to that question must clearly be in the negative." *Id.* at 1046.

The fact that the gun clubs are by definition private makes the requirement all the more suspect. "Compelled support of private association is fundamentally different from compelled support of government." *Abood v. Detroit Board of Education*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring).

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[25] The Court could have also listed Scout programs at gun clubs. *E.g., Di Cosala v. Kay*, 91 N.J. 159, 450 A.2d 508, 512 n.4 (1982) (Boy Scout rifle range rule requiring presence of NRA member).

Moreover, the Act irrationally discriminates in favor of gun club members and against non-members who owned the same type of property before the enactment. This discrimination deprives citizens of the equal protection of the laws.

Hetherton v. Sears, Roebuck & Co., 652 F.2d 1152, 1157-58 (3rd Cir. 1981), invalidated a law requiring firearm purchasers to be identified by two freeholders, on the basis that a state cannot "arbitrarily establish categories of persons who can or cannot buy the weapons. Clearly, Delaware could not limit the sale of firearms to men only or to members of certain religious groups." Many responsible citizens do not own real estate, *id.* at 1158, just as here many responsible citizens are not gun club members. "To limit the options of prospective purchasers for guns to a requirement that only people who own real estate can identify the purchasers is not more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns." *Id.* at 1160.

Similarly, typical club rules require a non-member to be sponsored by club members and voted in by the membership.[26] Some persons did not join clubs here because of inability to be endorsed by members. Cir. App. 162a-163a. Ability to register an assault firearm was thus predicated, similar to *Heatherton*, on having been endorsed by others.

Sklar v. Byrne, 727 F.2d 633, 635 & n.2 (7th Cir. 1984), upheld a handgun prohibition with an exception for handguns registered before the effective date. The grandfather clause was held rational because its purpose was "the protection of the reliance interests of those who purchased handguns legally before the effective date of the ordinance." *Id.* at 641.

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[26] *E.g., Concord Rod and Gun Club, Inc. v. Massachusetts Comm. Against Discrimination*, 402 Mass. 716, 719, 524 N.E.2d 1364 (1988).

"The purpose of protecting those who relied on prior laws . . . is a matter of simple fairness. Governments enact laws which invite citizens to invest their money and time and to arrange their affairs in reliance upon those laws." *Id.* at 641-42.

That is the Achilles' heel of the Act here – it irrationally protects the reliance interests of club members and abrogates the equal reliance interests of persons who were not club members. Persons are treated differently based on how they exercised their right to freedom of association. *Sklar* notes: "Where plaintiff can show that a grandfather provision impinges on a fundamental personal right . . ., courts should apply the compelling governmental interest standard." *Id.* at 639.

Invalidating an assault weapon registration scheme, *Peoples Rights Organization*, 152 F.3d 522, noted that the equal protection clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* at 531, quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Protecting the reliance interests of all equally would have been proper, but the law irrationally grandfathered only the firearms of those who had registered them under the prior law, which had been declared void. 152 F.3d at 531-32. Unlike federal law, which grandfathered all assault weapons "that were lawfully possessed on the date of the statute's enactment," the grandfather clause failed the rational basis test. "Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 532, quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996).[27]

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[27] *Galioto v. Dept. of the Treasury*, 602 F.Supp. 682 (D. N.J. 1985), *vacated as moot* 477 U.S. 556 (1986), invalidated a federal prohibition which allowed felons, but not ex-mental patients, to have their right to possess a firearm restored. The law classified persons "according to a *past* occurrence in their lives," allowed one class to show capacity for "handling firearms safely in the future," and denied that to the other,

In sum, by irrationally discriminating between persons based on whether they were members of gun clubs by a specified date, the Act deprives non-club members of equal protection of the laws and violates their right to freedom of association.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Attorney for Petitioners

*Counsel of Record

Gary J. Needleman
Needleman & Schocket
Montville Professional Bldg.
P.O. Box 187-Route 202
Montville, N.J. 07045
(201) 334-4422
Attorney for Petitioners

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similarly-situated class. *Id.* at 689. Here too, the classification is based on an irrelevant past event: club membership on an arbitrarily-specified date.